No. 84-743

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BETTY A. ROSEN,

Petitioner,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION, et al.,

Respondents.

RESPONDENT UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1879's BRIEF IN OPPOSITION TO THE PETITION

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January 4, 1985

QUESTION PRESENTED

Whether variances in wages which are the result of a sex-neutral seniority system, a sex-neutral merit system and other factors other than sex are permissible under Title VII.

PARTIES

The petitioner is Betty A. Rosen. Ms. Rosen was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1879, petitioner's local union, and Chrysler Plastic Products Corporation, petitioner's employer. Chrysler and the Union were the defendants in the district court and the appellees in the Sixth Circuit.

Respondent Chrysler, a wholly-owned subsidiary of Chrysler Corporation, filed a disclosure of corporate affiliations and financial interest dated May 25, 1983, with the Sixth Circuit.

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The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A to the petition. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "decisions without published opinions" at 742 F.2d 1457.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C.A. §§206(d)(1) and (2) (herein "Equal Pay Act"), and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§2000e

et seq. (herein "Title VII"), are reproduced in the petition, pp. 7-10.

Some regulations dealing with the Equal Pay Act of 1963, 29 C.F.R. §§800.146 and 800.147 are reproduced in the petition at pp. 10-13.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete and inaccurate. For this reason, respondent is compelled to set forth a Statement of the Case which presents a full chronological view of relevant facts and events.

Petitioner was hired in 1965 as a color matcher in the Production Department at a Sandusky, Ohio facility owned by the Air Reduction Company (Airco). Gary B. Dunn was hired into the same plant in 1966 and in 1967 was working in

the Styling Department. Chrysler purchased the facility from Airco in August of 1968. Shortly after the sale petitioner transferred into the Styling Department at the plant.

In 1971, Chrysler instituted a formal salary structure for its Sandusky facility salaried employees. Each classification was assigned to a labor grade. For each grade, a minimum, mid-point and maximum pay rate was provided. The structure spelled out a series of progression steps based on time in the classification, moving workers in increments from the minimum through a point slightly below the mid-point of the salary range for the job. From the mid-point on, the increments were no longer automatic and periodic; rather they were based upon merit. The 1971 wage structure was replaced with a substantially

similar, updated, slightly higher paid version in effect from May 14, 1973, through December 9, 1974.

By late 1972, Rosen held a grade 7 Technician-Test and Analysis classification, which she retained throughout 1973. At this time, Dunn and Rosen were performing different duties in different classifications and salary grades, at different pay rates. Their difference in sex had nothing to do with their pay differential. Certain unique graphic arts portions of Dunn's work, however, were thereafter increasingly performed by outside contractors, or otherwise eliminated for business reasons.

On January 2, 1974, the National Labor Relations Board certified the UAW as the collective bargaining representative of a bargaining unit composed of salaried employees at the Sandusky Chrysler

plant. The sex-neutral salary structure discussed above was in effect at this time. Rosen and Dunn became members of the UAW bargaining unit at its inception, and have continued to be represented by Local 1879.

In 1974, the Union negotiated its first collective bargaining agreement with Chrysler for the Sandusky plant salaried employees' bargaining unit. During contract talks, the Union and the Company encountered major difficulties in structuring a regular classification and pay system, because a number of employees had hitherto been misclassified for reasons of historical accident. The Union's reluctance to bargain a wage decrease or classification down-grade for any of its members led it to propose, and the Company to agree, that any employee receiving an improperly high

rate of pay because of misclassification would be "red circled" to avoid pay reduction. Thirteen employees, ten men and three women, were red circled. One of these employees happened to be Gary Dunn. Those workers would be allowed to retain their existing classification, labor grade, and position within the salary progression structure, so long as they remained in the same job. Employees newly entering the job would be correctly classified and paid accordingly.

The complete initial collective bargaining agreement was ratified by vote of the membership after a full explanation of its terms, including the red circling provision. By its terms the contract was effective December 9, 1974 through November 23, 1977.

The newly bargained pay provisions

were similar in form to the predecessor salary structure. There was a salary range for each job based on classification and labor grade. For each labor grade, the employee would start at a minimum, advance by automatic progression (seniority) through several wage increases; and then by performance increases (merit) through additional increases, until he or she reached the maximum of the salary range for classifications in that labor grade. Employees working in the same classification were routinely paid differently based upon the sex-neutral factors of seniority and merit.

To avoid disincentives to employee transfers and promotions and to cushion workers against wage reductions in the event of downgrades caused by workforce cut-backs, the parties bargained for

certain additional, sex-neutral wage retention provisions.

The "lower grade" rate retention provision ensured that an employee transferred to a lower grade would keep his or her same salary if the salary ranges of the old and new classifications overlapped. If the worker's rate in the old classification was higher than the maximum on the new job, the worker's pay would be reduced to the maximum of the new classification's salary range.

The initial collective bargaining agreement also provided for general increases and Cost of Living Adjustment (COLA) fold-ins to be paid in equal flat dollar amounts to all workers on top of their base rates.

Immediately after the collective bargaining agreement went into effect, Rosen was classified as a Technician-

Test and Analysis, a labor grade 7 job, and she was earning $208.35 per week. Dunn was red circled as an Illustrator-Graphic B, labor grade 9, earning $224.26 per week.

During the 1974 agreement, Rosen and Dunn both thereafter received identical dollar amount wage increases as part of general across-the-board or COLA wage increases. In addition, each received merit pay increases.

On September 15, 1975, Rosen filed a grievance protesting that she was underpaid compared to Dunn. While that grievance was pending, she filed charges with the Equal Employment Opportunity Commission (EEOC) against both the Company and the local Union complaining of the pay differential. On January 25, 1979, EEOC issued a Notice of Right to Sue. On August 31, 1976, plaintiff

filed charges with the Ohio Civil Rights Commission against Chrysler and Local 1879, claiming the salary difference was discriminatory; the Ohio agency found no probable cause to believe discrimination had occurred on June 7, 1977.

In 1977, the Company and the Union negotiated their second collective bargaining agreement. This agreement's duration was from December 8, 1977 through November 23, 1980. The new contract continued the classifications, labor grades and corresponding salary range schedule. The red circling agreement to continue previously misclassified workers at their higher classifications, labor grades and pay rates was similarly renewed. However, Dunn, who was then bargaining unit chairperson, voluntarily deleted himself from the list of thirteen workers with

grandfathered classifications and labor grades. He succeeded in bargaining for a classification upgrade for plaintiff. Thus, because of Dunn's and Local 1879's own efforts, as of December 19, 1977, both Rosen and Dunn were reclassified to the newly-created position of Color Specialist - Styling, labor grade 8.

Rosen moved to the merit pay level within labor grade 8. Her wages immediately increased from $266.90 to $273.95. Rosen's new pay was established by applying to her upgrade the contractual provision for promotions.

Dunn's pay rate remained unchanged at $290.83. This was a consequence of the application to his downgrade of the contractual provision protecting workers against wage loss upon demotion. His labor grade 9 rate was lower than the labor grade 8 maximum. He was therefore

placed onto the labor grade 8 salary range at his old labor grade 9 rate, which put him at the merit increase level. Thereafter, Rosen and Dunn received identical general wage increases and COLA.

Again in 1980 the parties negotiated a third collective bargaining agreement, in effect from October 16, 1980 through November 23, 1983. This third agreement again renewed the contractual system of classifications, labor rate retention, and salary ranges. The rate retention, anti-wage loss provision for pay upon promotion, transfer or demotion was likewise maintained in the new collective bargaining agreement.

Assuming subsequent contracts, as in the past, renew the wage and classification structure without relevant changes, within a few years, Dunn will reach the

labor grade 8 maximum. When Dunn reaches the maximum rate, all future automatic or merit increases to Rosen will narrow the gap, until both are at the maximum and are paid equally.

On or about February 16, 1979 petitioner commenced this action by filing a Complaint against her employer, Chrysler Plastic Products Corporation (Chrysler) and her local union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1879 (Local 1879) in the United States District Court for the Northern District of Ohio, Western Division. In that Complaint petitioner alleged that the wage disparity between herself and Gary Dunn was a denial of equal pay for equal work and constituted unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.).

Answers were filed and discovery undertaken. All parties moved for summary judgment. On March 28, 1983 the District Court filed an opinion, order and accompanying judgment denying petitioner's motion and granting respondents'.

The District Court held that the initial wage disparity between petitioner and Gary B. Dunn was due to a factor other than sex, i.e., the undisputed fact that at least until 1973 Gary B. Dunn performed work that was different than petitioner's and which petitioner did not perform. The District Court also held that at all other relevant times, the difference in wages was due to factors other than sex, i.e., the valid sex-neutral collectively bargained provisions to red circle the higher classifications and pay rates for

thirteen improperly classified men and women and to protect all employees against salary reductions in the event of a demotion to a lower graded job.

Petitioner appealed the District Court's decision to the Sixth Circuit. On August 8, 1984, after briefs and oral argument, the Sixth Circuit issued a per curiam opinion adopting the findings and conclusions of the District Court and affirming that judgment.

The instant Petition for Certiorari was served on November 5, 1984.

ARGUMENT - REASONS FOR DENYING THE PETITION

Variances in Wages Which are the Result of a Sex-Neutral Seniority System, a Sex-Neutral Merit System and Other Factors Other Than Sex are Permissible Under Title VII.

Although pled under Title VII of the Civil Rights Act of 1964, this case

involves a "classic" Equal Pay Act type claim of denial of equal pay for substantially equal work. The relevant legal standards for analyzing such an equal pay claim do not differ, regardless of the statutory basis alleged. Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981); Strecker v. Grand Forks County Social Service Board, 640 F.2d 96, 99 (8th Cir. 1980) (en banc).

The Bennett Amendment, the last sentence of §703(h) of Title VII, 42 U.S.C. §2000e-2(h) incorporates into Title VII wage discrimination claims the Equal Pay Act four affirmative defenses.

The Bennett Amendment states:

> "It shall not be unlawful unemployment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of title 29." 42 U.S.C. §2000e-2(h).

The Equal Pay Act reads in pertinent part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. §206(d)(1).

The purpose of the Bennett Amendment was to ensure that Title VII and the Equal Pay Act would be mutually consistently interpreted in their area of overlap, i.e., claims of sex discrimination based upon denial of equal pay for equal work. County of

Washington v. Gunther, 452 U.S. at 160, 170, 174 (1981).

The Equal Pay Act exempts wage differentials pursuant to (i) a seniority system; (ii) a merit system; (iii) a piecework or incentive system; or (iv) any other factor than sex. 29 U.S.C. §216(d)(I).

The legislative history in both the House and the Senate establishes the broad scope of the final exception. The Senate noted its intention to permit the use of any non-sex-based wage-setting factor:

> "S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential. For example, a woman and a man may be doing precisely the same work at adjacent posts, and yet the man may be earning substantially more than the woman, or vice versa, because of

> his or her tenure on the job. Such seniority systems are valid exceptions provided they are based on tenure and not upon sex.
>
> "Similarly, a merit system or piecework system which measures either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same work. Obviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements. Without question, employers have other valid classification programs which can justify an exception."
> (Emphasis added).

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963).

The House was even more definitive in expressing its intent to make the fourth exemption a catch-all, and it explicitly endorsed "red circling" as one such legitimate factor other than sex.

> "Three specific exceptions and one broad general exception are also

listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs." (Emphasis added.)

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, reprinted in [1963] U.S. Code Cong. & Admin. News, 687, 689, also reprinted

in Staff of House Comm. on Education & Labor, Legislative History of the Equal Pay Act of 1963, 88th Cong., 1st Sess. 44 (1963). See, generally, Hodgson v. William and Mary Nursing Hotel, 65 CCH Lab. Cas. ¶32,497 (M.D. Fla. 1971).

The Department of Labor regulations follow this expression of Congressional intent in recognizing bona fide red circling as a legitimate nondiscriminatory reason for a wage differential. 29 C.F.R. §§800.146, 800.147. Courts have recognized that the red circle principle "has yet to be defined in all its manifestations; the flexibility of the concept has been preserved by anticipation of the particular needs that may arise in attempting to reconcile legitimate business necessities with the dictates of the Act..." Marshall v. J.L.

Hudson Co., 25 FEP Cases 1101 (E.D. Mich. 1979).

The wage differential between Dunn and Rosen was caused by the routine operation of certain portions of the collective bargaining agreement: the standard salary/classification structure and the special provision red circling thirteen employees' pre-existing classifications and pay rates in the initial labor agreement. The salary structure causes pay differentials among workers holding the same classification based upon time in the job and merit. The automatic progression portion of the schedule is a seniority-based differential; the merit increase portion constitutes a merit system. The combined system is exempted under the first and second Equal Pay Act affirmative defenses. See, e.g., Strecker v. Grand Forks County Social

Service Board, 640 F.2d 96 (8th Cir. 1980); EEOC v. Aetna Ins. Co., 616 F.2d 719, 725-726 (4th Cir. 1980); EEOC v. Cleveland State University, 28 FEP Cases 1782, 29 EPD ¶32,783 (N.D. Ohio 1982); Noles v. Concord Lace Corp., 25 FEP Cases 367, 370 (M.D.N.C. 1980).

In the 1974 agreement, the red circling agreement also contributed to plaintiff's wage disparity. It preserved Dunn's higher classification, labor grade, and position on the salary structure. The same agreement also preserved the higher classifications and corresponding salaries of twelve other men and women. The purpose of the red circling agreement was to protect these thirteen men and women from bearing the brunt of a correction in mis-classification, such mis-classification being not the fault of error of any of

the individual men and women. Such a red circling agreement, whose purpose is not to discriminate or to insulate prior discrimination from judicial scrutiny, is a valid factor other than sex within the scope of the fourth exemption. See, e.g., Mangiapane v. Adams, 20 FEP Cases 699, 19 EPD ¶9,030 (D. D.C. 1979), aff'd, 24 EPD ¶31,277 (D.C. Cir. 1980); Salazar v. Marathon Oil Co., 502 F. Supp. 631 (S.D. Tex. 1980); Noles v. Concord Lace Corp., 25 FEP Cases 367 (M.D.N.C. 1980); Hodgson v. Lenkurt Electric Co., 5 EPD ¶8,106 (N.D. Cal. 1973).

In 1977 contract talks, Dunn voluntarily relinquished his red circled status at labor grade nine, in return for Chrysler's agreement to reclassify Rosen, as well as himself, in a newly-created labor grade 8 position. This

increased Rosen's potential for future pay increases, while decreasing Dunn's own. At the point where the new collective bargaining agreement became effective, the red circling agreement ceased to be a cause of the salary differences between Dunn and Rosen. Rosen was treated as having received a promotion, and was paid according to the contractual provisions for promotions to a higher labor grade. She was placed on her new labor grade 8 progression, one step higher than her prior pay rate on labor grade 7. Dunn was treated as a contractual demotion, and his pay step was determined in accordance with the provision which protects all workers regardless of sex from pay loss upon demotion.

This wage retention provision may be regarded as a variant of red circling,

see, Noles v. Concord Lace Corp., 25 FEP Cases at 368; Hodgson v. Lenkurt Electric Co., supra; or it may be viewed as an integral part of the salary system, and a factor other than sex. Either way, it falls within the fourth exemption.

Each of these contractual provisions, separately and in their cumulative operation, are sex-neutral, applied uniformly to the entire bargaining unit, without regard to sex. They were not negotiated or applied with the intent to discriminate on the basis of sex or otherwise, but for legitimate business and union reasons. None was negotiated as a proxy for the sex of the affected workers, or as a pretext to perpetuate prior sex discrimination. Each of the several factors contributing to the salary differences between Rosen and

Dunn is a legitimate, non-discriminatory basis for different pay.

Petitioner does not dispute that the wage differential between Dunn and her was caused by their initially different jobs and classifications, the subsequent red circling of Dunn's position, the routine application of the automatic and merit progression system, and the normal protection accorded Dunn's wage rate when he voluntarily accepted a down-grade. Nor does Rosen challenge the legal proposition that the automatic progression/merit system is protected as a bona fide merit/seniority system under the first and second affirmative defenses. Rather, petitioner claims that:

> "[t]he purpose and limits of 'red-circling' need clarification to prevent a misapplication of the concept so severe as to cause a permanent perpetuation of prior discrimination in the payment of wages." (Petition at 21).

As previously stated, it is undisputed that the initial disparity in wages was due to the fact that Dunn and petitioner were performing different work. Thus, there is no "prior discrimination" in this case. Secondly, the red circling agreement ceased to be a cause of salary disparity in 1977 when Dunn voluntarily took a demotion to a lower graded position and persuaded Chrysler to upgrade petitioner to that position. From that point on any disparity would be the result of the sex-neutral automatic and merit progression wage system applicable to all employees and the sex-neutral lower grade wage protection provisions which also apply to all employees. The purposefully broad language of the statute, the legislative history, the regulations and the case law all preserve the broad and general defense of "any other factor other than sex" and

specifically acknowledge that red circling is a flexible concept that can be implemented for many valid reasons. Case law also demonstrates that courts have no difficulty in striking down red circling agreements which are a subterfuge for sex discrimination. The factual predicate of those cases is strikingly absent here. The record shows, without dispute, a history of different pay between Rosen and Dunn attributable to his performing different duties in a different classification. Over time, Dunn's duties altered, until gradually they came to equal Rosen's. Dunn's different pay rate did not stem from a history of classifying women and men workers in the Sandusky plant differently and underpaying the women who did the same work as the men. Indeed the record specifically negatives any such fact pattern, the facts show that

at all relevant times some women made more than some men for performing work in the same classification due to operation of the sex-neutral salary progression system. Further, no discriminatory purpose for the red circling has been shown. All witnesses to the initial bargaining attested that the objective of the red circling provision was to avoid reducing the wages of thirteen men and women who had been improperly overclassified for reasons unrelated to sex. Nor has petitioner shown or even alleged discriminatory application of the red circling provisions. No female employees similarly misclassified were excluded from the red circling and no men were included among the red circled employees who should not have been.

Petitioner has had an opportunity to litigate her claims in the District Court and in the Sixth Circuit Court of

Appeals. On the facts and the law both courts determined that there was no unlawful discrimination because of sex as to petitioner. Petitioner has failed to even suggest a basis for error in the decisions below. It is clear that further review by this Court is neither warranted nor appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be declined.

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief in Opposition to the Petition were served upon each of the parties in the foregoing cause, by sending same by ordinary U.S. Mail, with postage prepaid, on this 4th day of January, 1985, addressed as follows:

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